



FIRST AMENDMENT LAW REVIEW

Volume 9 | Issue 3

Article 8

3-1-2011

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Jeffrey Lakin

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Recommended Citation

Jeffrey Lakin, *Atheists in Foxholes: Examining the Current State of Religious Freedom in the United States Military*, 9 FIRST AMEND. L. REV. 713 (2018).

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ATHEISTS IN FOXHOLES: EXAMINING THE CURRENT STATE OF RELIGIOUS FREEDOM IN THE UNITED STATES MILITARY

*Jeffrey Lakin**

INTRODUCTION

On the evening of May 13, 2010, Fort Eustis in Virginia hosted an installment of a Commanding General's Spiritual Fitness Concert Series featuring the band BarlowGirl.¹ The band describes itself on its website as "tender-hearted, beautiful young women who aren't afraid to take an aggressive, almost warrior-like stance when it comes to spreading the gospel and serving God."² Among those in attendance that evening were men and women of A Company, 1st Battalion, 222nd Aviation Regiment, with the notable exception of eighty soldiers, including Private Anthony Smith.³

These soldiers, who opted out when told the unit would be attending the concert as a group, were marched back to the barracks and placed on "lockdown," where their activities were restricted — according to Smith, they were given orders to clean and were barred from sitting down on their beds or using cell phones or other electronic devices for the evening.⁴ When Smith and eight other soldiers sought to file a complaint with Equal Opportunity officers in their chain of command, they were met with resistance and dissuaded from filing a formal

* Juris Doctor Candidate, University of North Carolina School of Law, 2012. The author wishes to thank his family and friends for their support throughout the writing process, the *First Amendment Law Review* editorial staff for their time and proofreading abilities, and Professors William P. Marshall and Eric L. Muller for their input and insights.

1. Joe Gould, *Soldiers Allege Punishment over Christian Concert*, ARMY TIMES (Springfield, Va.), Sept. 6, 2010, *available at* 2010 WLNR 18650062.

2. BarlowGirl.com, About BarlowGirl, <http://www.barlowgirl.com/about> (last visited Apr. 14, 2011).

3. Gould, *supra* note 1.

4. *Id.*

complaint, until only Smith and one other soldier persisted in their complaints. “The religion thing being shoved down my throat is really something that doesn’t work for me,” Smith told *Army Times*. “As far as what I believe, I believe there’s something out there, but it’s a really personal thing with me. If I have a relationship with God or that entity, it is not anybody’s business, ever.”⁵ While the Army conducted an investigation into the incident, the Military Religious Freedom Foundation, and its founder, Mikey Weinstein, prepared a federal lawsuit on behalf of Smith and another soldier, who is remaining anonymous.⁶

The delicate balance between individual liberty and national security is perhaps most clearly expressed in the governance and policies of the United States Armed Forces. In theory, those serving in our citizen military should have the same rights and freedoms that are granted to their civilian counterparts — the rights and freedoms found in the Constitution they fight to defend. The courts, however, have determined that the efficient and disciplined operation of a national defense force requires a different standard that may occasionally set greater constraints on those rights.⁷ In defining those standards, courts, and especially the United States Supreme Court, have largely remained silent, seeing it sufficient to grant broad deference to the Department of Defense and individual military branches to set policy, with redirection of their policy coming not from the bench but from the legislature.⁸ As a result, the military has seen fit to curtail rights that do not necessarily fall within the purview of efficient institutional operation — particularly with regard to freedom of religion.⁹ Religious toleration in the military has arisen as a controversial matter numerous times over the past century,¹⁰ and it has been raised again by the recent efforts of the Military Religious Freedom Foundation, an advocacy organization leveling serious charges of undue religious coercion such as those outlined above.¹¹ While the organization has not yet been successful in gaining traction in the courts, with most of

5. *Id.*

6. *Id.*

7. See *infra* notes 81-92 and accompanying text.

8. See *infra* notes 81-92 and accompanying text.

9. See *infra* notes 81-92 and accompanying text.

10. See *infra* notes 93-125 and accompanying text.

11. See Military Religious Freedom Foundation, Legal, <http://militaryreligiousfreedom.org/legal> (last visited Apr. 14, 2011).

its litigation getting dismissed early in the trial stages,¹² the situations of the soldiers who are represented by the organization demonstrate how tenuous religious freedom can be in the military.

Indeed, if the allegations described in Private Smith's case are true, they appear, even to a casual observer, to be fairly serious violations of an individual's First Amendment right to free exercise of religion, as well as prohibitions on a government-established church.¹³ So why have the courts dismissed such claims? Is there a situation in which a military religion case could be properly advanced, and if such a case were to make it to the Supreme Court, would the court have the ability to break its trend of general deference to military operations?

This Note argues that, given the right case, the Court could and should take up the issue of religious toleration in the military and that the Court should require greater oversight of the military command structure's protection of the individual rights of those serving in the armed forces. Part I briefly outlines the controversies raised and approaches taken by the Military Religious Freedom Foundation, the latest activist organization to challenge the military's practices. Part II explores the history of the Court's interpretation of religious freedoms, both inside the military and in civilian life and seeks to articulate the Court's current stance on military religious freedom and the military's policy response. Part III returns to the litigation aided by the Military Religious Freedom Foundation, attempting to determine how future legal action might be retooled to survive and even prevail in the federal judicial system. The Note concludes that if the Supreme Court were faced with a properly argued case, it could reasonably take a less deferential stance toward the military than it has in the past, given the

12. See Gould, *supra* note 1.

13. See Editorial, *Military Proselytizing: Plain Wrong*, RICH. TIMES-DISPATCH, Oct. 10, 2010, available at 2010 WLNR 20240646. The Editorial noted:

If the investigation into the matter determines that soldiers were indeed punished for not attending a faith-based event, then the Pentagon should make an example out of those responsible. Members of the armed forces should not be forced to believe anything, except that trying to impose their beliefs on others will get them in trouble.

Id. Of course, this editorial is just one common lay interpretation of what is guaranteed by the Free Exercise and Establishment Clauses. The nuance and ambiguity of each will be discussed later in this Note.

recent recognition of certain constitutional protections of religious freedom, the current controversies and concerns being voiced, and those looming on the horizon.

I. CURRENT CONTROVERSY: THE MILITARY RELIGIOUS FREEDOM FOUNDATION

Founded in 2006,¹⁴ the Military Religious Freedom Foundation (MRFF) declares in its mission statement that it is “dedicated to ensuring that all members of the United States Armed Forces fully receive the Constitutional guarantees of religious freedom to which they and all Americans are entitled by virtue of the Establishment Clause of the First Amendment,” believing that “religious faith is a Constitutionally guaranteed freedom that must never be compromised, except in the most limited of military circumstances, because of its fundamental importance to the preservation of the American nation and the American way of life” and that “no American has the right to question another American’s beliefs as long as they do not unwontedly intrude on the public space or the privacy or safety of another individual.”¹⁵ Its leader, Mikey Weinstein, is a 1977 graduate of the United States Air Force Academy who served 10 years of active duty as a JAG officer before working as an assistant general counsel in the Reagan White House.¹⁶ He was later employed as general counsel to Ross Perot before founding MRFF.¹⁷ Weinstein has spent the ensuing years raising challenges both great and small on religious freedom in the armed forces, each time gaining a higher profile, more supporters, and more active-duty military

14. Military Religious Freedom Foundation, Michael L. “Mikey” Weinstein, <http://www.militaryreligiousfreedom.org/about/michael-l-mikey-weinstein> (last visited Apr. 14, 2011).

15. Military Religious Freedom Foundation, Our Mission, <http://www.militaryreligiousfreedom.org/about/our-mission> (last visited Apr. 14, 2011). Interestingly, the mission statement does not specifically mention the Free Exercise Clause. *See id.*

16. Military Religious Freedom Foundation, *supra* note 14. *See also* Jeff Sharlet, *Jesus Killed Mohammed: The Crusade for a Christian Military*, HARPER’S MAG., May 2009, at 31, 36.

17. Military Religious Freedom Foundation, *supra* note 14.

“clients.”¹⁸ He also attracts a great deal of controversy and outright hatred from his targets, both real and perceived, stemming largely from his outspoken, media-savvy persona embodied in statements such as his declaration that “[t]his country is facing a pervasive and pernicious pattern and practice of unconstitutional rape of the religious rights of our armed forces members,” a process he refers to as “soul rape.”¹⁹

Between the bold statements and fiery rhetoric, there lies little actual litigation. Most of the MRFF and Weinstein’s battles are played out in the court of public opinion, through press releases and television appearances designed to stoke outrage among those sympathetic to his cause.²⁰ There have been some instances, however, in which the MRFF went so far as to sue the Department of Defense on behalf of various atheist soldiers claiming violations of religious freedom. In March 2008, the MRFF filed suit on behalf of Specialist Jeremy Hall in federal court in Kansas, after Hall was sent home early from Iraq due to threats from fellow soldiers.²¹ The harassment stemmed from Hall’s efforts to organize a meeting of the Military Association of Atheists and Freethinkers at Camp Speicher in Iraq in July 2007.²² At the meeting, he was accosted by an officer, Major Freddy J. Welborn, who, according to Hall’s sworn statement, informed Hall that “[p]eople like you are not holding up the Constitution and are going against what the founding fathers, who were Christians, wanted for America!”²³ Major Welborn also threatened to bar Hall’s reenlistment and bring charges against Hall and a fellow soldier in attendance.²⁴ Mistrustful of his superior officers, Hall declined to pursue a complaint with the Army’s Equal Opportunity Office and chose instead to contact the leadership of the Military

18. Sharlet, *supra* note 16, at 36-37 (listing among Weinstein’s victories a Department of Defense investigation into six Pentagon officials who appeared in uniform in a video for Christian Embassy, an elite fundamentalist ministry operation, and the adoption of religious diversity classes into the curriculum at the Air Force Academy).

19. *Id.* at 37.

20. See Military Religious Freedom Foundation, Media, <http://www.militaryreligiousfreedom.org/media-events/> (last visited Mar. 26, 2011).

21. Neela Banerjee, *Soldier Sues Army, Saying His Atheism Led to Threats*, N.Y. TIMES, Apr. 26, 2008, at A14.

22. *Id.*

23. *Id.*

24. *Id.*

Association of Atheists and Freethinkers, which put him in contact with Weinstein and the MRFF.²⁵ Weinstein sees Hall's decision as a common one, arguing that the low number of fifty formal complaints received by the Pentagon since 2005 stems from mistrust and fear of retribution from superiors.²⁶ "Religion is inextricably intertwined with [soldiers'] jobs," Weinstein said to *The New York Times*. "You're promoted by who you pray with."²⁷ Government attorneys with the Justice Department responded to Hall's suit with a motion to dismiss, arguing that Hall lacked standing to sue the Pentagon before exhausting military remedies to his complaints.²⁸ "Judicial review would significantly interfere with Army operations and intrude on disciplinary and personnel decisions entrusted to military judgment," the government wrote in a supporting memorandum to its motion.²⁹ "[T]he Army was deprived of the opportunity to promptly investigate the alleged misconduct and take appropriate disciplinary action."³⁰

While Weinstein protested the motion to dismiss, calling it "ludicrous to go through the chain of command" due to the pervasiveness of religious influence,³¹ Hall voluntarily dismissed the lawsuit in October 2008 before further action could be taken.³² Hall and MRFF cited Hall's plans to leave the Army the following spring as the predominant reason for the dismissal, in turn avoiding further legal wrangling over standing in federal court once he was no longer in the Army.³³ This did not end MRFF's legal campaign, however — Weinstein had already initiated

25. *Id.*

26. *Id.*

27. *Id.*

28. Defendant's Motion to Dismiss at 1, Hall v. Welborn, No. 08-2098 (D. Kan. July 8, 2008), available at http://www.militaryreligiousfreedom.org/legalfiles/MOT_TO_DISMISS.pdf.

29. Memorandum in Support of Defendant's Motion to Dismiss at 3, Hall v. Welborn, No. 08-2098 (D. Kan. July 8, 2008), available at http://www.militaryreligiousfreedom.org/legalfiles/MEMO_IN_SUPPORT.pdf

30. *Id.* at 1.

31. John Milburn, *Government seeks dismissal of soldier's suit*, ASSOCIATED PRESS ALERT, July 10, 2008, available at Westlaw.

32. Notice of Voluntary Dismissal at 1, Hall v. Welborn, No. 08-2098 (D. Kan. Oct. 10, 2008), available at http://www.militaryreligiousfreedom.org/legalfiles/dismissal_sep08.pdf.

33. John Milburn, *Kansas atheist soldier drops lawsuit*, ASSOCIATED PRESS ALERT, Oct. 10, 2008, available at Westlaw.

legal proceedings against the Department of Defense on behalf of a second plaintiff, Dustin Chalker, a soldier stationed at Fort Riley in Kansas.³⁴ Chalker, also an atheist, cited numerous events between December 2007 and May 2008 that he was required to attend and at which Christian prayers were delivered.³⁵ Additionally, the lawsuit places Chalker's incidents as part of a larger pattern of specific discrimination by fundamentalist Christians in the armed forces pressing their views upon subordinates, most notably in the endorsement of a "spiritual handbook" for soldiers by General David Petraeus.³⁶ The Department of Justice again sought dismissal in response in April 2009, primarily on the same grounds of standing used against Hall, contending that Chalker did not pursue his claims aggressively enough within the military before resorting to a civil suit.³⁷ Furthermore, the Department of Justice's response suggests the specific prayer complaints attack a tradition of military religious observances dating back to the Revolutionary War, and that Chalker's allegations of a larger systematic pattern of religious endorsement are "precisely the kind of generalized grievances that are routinely rejected by the federal courts."³⁸ Indeed, on January 7, 2010, the United States District Court for the District of Kansas granted the motion to dismiss, finding "plaintiffs' claims are nonjusticiable because plaintiffs did not exhaust intramilitary remedies . . . [therefore] this case should be dismissed for lack of jurisdiction."³⁹

34. See Complaint for Injunctive Relief, Chalker v. Gates, No. 08-2467-KHV-JPO (D. Kan. Sept. 25, 2008), available at http://www.militaryreligiousfreedom.org/legalfiles/complain_sept08.pdf.

35. *Id.* at 3.

36. *Id.* at 5. The book, *Under Orders: A Spiritual Handbook for Military Personnel*, written by Air Force Lieutenant Colonel William McCoy, "mak[es] the case for the necessity of religion — preferably Christian — for a properly functioning military unit." Sharlet, *supra* note 16, at 35. Gen. Petraeus' endorsement reads "*Under Orders* should be in every rucksack for those moments when Soldiers need spiritual energy." *Id.* When pressed by MRFF, the General claimed this was a private communication between two Christian soldiers taken out of context. *Id.* at 35-36.

37. Memorandum in Support of Defendant's Motion to Dismiss at 6-25, Chalker v. Gates, No. 08-2467-KHV-JPO (D. Kan. Apr. 9, 2009), available at http://www.militaryreligiousfreedom.org/legalfiles/doj_chalker.pdf.

38. *Id.* at 2-3.

39. Memorandum and Order at 2, Chalker v. Gates, No. 08-2467-KHV-JPO (D. Kan. Jan. 7, 2010), available at <http://www.militaryreligiousfreedom.org>

In filing its motion to dismiss, the Justice Department turned the question before the courts from one of the merits of Specialist Chalker's First Amendment claims to one of federal jurisdiction. Was this a case the court could even consider? In finding the claims nonjusticiable because intramilitary remedies had not been exhausted, the district court essentially found a lack of ripeness to Chalker's case. As defined by constitutional scholar Erwin Chemerinsky, "the ripeness doctrine seeks to separate matters that are premature for review because the injury is speculative and may never occur, from those cases that are appropriate for federal court action."⁴⁰ While Chalker has indeed suffered injury that he has standing to contest, the court does not recognize an injury as having occurred until the military has conclusively failed to act on his complaints.⁴¹

The Military Religious Freedom Foundation's pending matters as of April 2011, including the one involving Private Smith that was noted above, are only in the preliminary stages and, thus, the question persists whether cases of the sort brought by Hall and Chalker are in fact addressing violations of their religious freedoms in the military setting. If they had indeed gone through the ranks of the military command, would their grievances have been redressed at some point along the line? Or, as Weinstein seems to suggest in his portrait of pervasive Christian religious culture in the armed forces, would Hall and Chalker have been pressured to relent, and their grievances swept under the rug, before the matters were ripe for consideration by the federal courts? If the latter were true, could the court then find ripeness in the face of this evidence and intervene to protect Hall and Chalker's First Amendment rights? The answers to these questions require an examination of the tense relationships, contrasts, and contradictions that exist between civilian and military First Amendment protection, between speech rights broadly and religious rights specifically, and even between the religion clauses of the First Amendment.

/legalfiles/chalker_dismissal_filing.pdf.

40. ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 2.4.1 (5th ed. 2007).

41. See Memorandum and Order, *supra* note 39, at 11-13.

II. HISTORY OF FREEDOM OF RELIGION IN THE MILITARY

A comprehensive overview of the precedent leading up to the current state of the law on religious toleration in the military requires the analysis of three distinct strands of cases: those concerning the religious freedoms of the civilian population, those concerning the broader First Amendment rights of members of the military, and finally, those directly addressing religious freedoms within the military. From there, one can see how those decisions have influenced the development of military policy on religious accommodation and freedom from coercion and whether this policy has been effective in addressing the religious rights of service members.

A. The Establishment Clause Cases: Developing a Doctrine of Accommodation

The earliest Establishment Clause cases appeared in the schools, with arguments that established the limitations of strict separation imposed by the Free Exercise Clause, essentially claiming that in order to exercise faith freely, religious persons require some minimal degree of accommodation from the government. In *Zorach v. Clauson*,⁴² the Supreme Court upheld a program of “released time” religious instruction in the New York Public Schools, in which students were released from school with parental permission to receive off-site religious instruction.⁴³ In its reasoning, the Court distinguished the New York program from the Illinois program it previously overturned in *McCormack v. Board of Education*,⁴⁴ noting that the program in *McCormack* utilized public school facilities for religious instruction, while the *Zorach* program’s religious instruction took place exclusively at off-site religious centers.⁴⁵ To the three dissenting Justices in *Zorach*, however, this distinction was not enough to free the program from being a state endorsement of religion through coercion.⁴⁶ In his dissent, Justice Frankfurter shifted the attention from those students who attended religious education to those

42. 343 U.S. 306 (1952).

43. *Id.* at 308-09.

44. 333 U.S. 203 (1948).

45. *Zorach*, 343 U.S. at 308-09.

46. *Id.* at 316-17 (Black, J., dissenting).

who chose not to participate: "The pith of the case is that formalized religious instruction is substituted for other school activity which those who do not participate in the released-time program are compelled to attend."⁴⁷ He quoted the appellants as alleging that this scenario "inevitably results in the exercise of pressure and coercion upon parents and children to secure attendance by the children for religious instruction."⁴⁸ According to Ira C. Lupu and Robert W. Tuttle, this opinion and its dissent worked respectively to justify and establish the limits of a concept of religious accommodation, in which principles of Free Exercise are used to argue that strict separation between church and state undermines individual religious liberties.⁴⁹ "Under [the accommodation concept's view of] history, the founders' decision not to establish a national church went hand-in-hand with a general agreement that religion deserves great respect in the polity," they wrote.⁵⁰ "Through accommodation of religion, the government demonstrates respect for the religious lives of its people."⁵¹

Later, in the case of *School District of Abington Township v. Schempp*,⁵² the Court further defined the limitations of religious accommodation, holding unconstitutional the practice of prayer and bible reading as part of daily announcements in a public school.⁵³ While the majority opinion focused on the clear violation of religious neutrality,⁵⁴ Justice Brennan's concurrence explored the school officials' defense that the practice was a form of religious accommodation, using the military chaplaincy as a point of permissible accommodation for comparison.⁵⁵ Justice Brennan noted two primary distinguishing features that set chaplains apart from school prayer, in prisons as well as in the military. First, military and prison chaplains are voluntary resources for those who seek them out, while students are coerced into listening to prayer during

47. *Id.* at 321 (Frankfurter, J., dissenting).

48. *Id.*

49. Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. VA. L. REV. 89, 105 (2007).

50. *Id.*

51. *Id.*

52. 374 U.S. 203 (1963).

53. *Id.* at 205-07, 223.

54. *Id.* at 223-25.

55. *Id.* at 296-99 (Brennan, J., concurring).

the announcements.⁵⁶ Second, chaplains are provided as a service to prisoners and service members as a result of their being isolated from their religious communities, serving as a point of access where there ordinarily would not be one.⁵⁷ The legal obligation to attend school, on the other hand, puts no such restriction on students' access to religious exercise.⁵⁸ Justice Brennan's concurrence confirmed the fine balancing act that an accommodation view of the Establishment Clause required: permitting free exercise while hedging against any activities that would serve as a coercive influence.

B. The Free Exercise Cases: A Definitional Divide

While the Establishment Clause cases grappled with how much respect government could affirmatively grant to religion, Free Exercise jurisprudence concerned itself with statutes that negatively impacted religious activity. In the 1963 case of *Sherbert v. Verner*,⁵⁹ the Supreme Court declared for the first time that violations of an individual's right to free exercise of religion will be subject to strict scrutiny, holding that a Seventh Day Adventist was eligible for unemployment benefits after losing her job for being unable to work on Saturday, which was considered in her faith to be the Sabbath.⁶⁰ Thus, in order for a state actor to infringe upon an individual's religious practice, it would need a compelling reason to do so in order for it to be constitutionally permissible.⁶¹ This standard held sway in the Court for decades and even seemed to be expanded to areas outside the workplace setting.⁶²

56. *Id.* at 298-99.

57. *Id.* at 299.

58. *Id.*

59. 374 U.S. 398 (1963).

60. *Id.* at 399-403.

61. *Id.* at 406-09.

62. See *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707 (1981) (holding that an employee who quits on the grounds of religious objection is entitled to unemployment benefits); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that Amish families were not required to send their children to school past eighth grade).

In 1990, the Court's ruling in *Employment Division, Department of Human Resources v. Smith*⁶³ dispensed with the compelling interest test in determining the permissibility of religious use of peyote.⁶⁴ Writing for the majority, Justice Scalia declared that a compelling interest test permitted man "'to become a law unto himself,'"⁶⁵ and, in a pluralistic society such as the United States, allowing religious beliefs to be a means for contravening established law "would be courting anarchy."⁶⁶ Instead, he saw the test as being whether the law in question was neutral and of general applicability and designed to prohibit socially harmful conduct.⁶⁷ If these standards were met, the state was free to infringe upon religious expression by way of the law, regardless of whether or not a compelling reason to infringe was present.⁶⁸

Scalia's new interpretation of free exercise in *Employment Division v. Smith* was controversial, criticized by concurring justices within the opinion itself,⁶⁹ and by legal scholars after the fact.⁷⁰ Vincent Phillip Muñoz noted that the *Employment Division v. Smith* case created a divide over the true originalist interpretation of the Free Exercise Clause.⁷¹ One side, represented by Justice O'Connor, relied on the scholarship of Judge Michael McConnell and argued for the *Sherbert* interpretation. Under this interpretation, religion is privileged conduct absent a compelling government interest, with evidence of the Founders' intention found in the form of pre- and post-Revolutionary state

63. 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. § 2000bb to bb-4 (1993)).

64. *Id.* at 884-85.

65. *Id.* at 885 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1879)).

66. *Id.* at 888.

67. *Id.* at 884-85.

68. *Id.*

69. *See id.* at 891 (O'Connor, J., concurring in the judgment) (writing that the "holding dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty").

70. *See, e.g.,* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990) (criticizing the opinion's use of legal sources as well as its theoretical argument).

71. Vincent Phillip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL'Y 1083, 1083-84 (2008).

constitutions, as well as supplementary writings of James Madison.⁷² The other interpretation, championed by Justice Scalia and aligned with the work of “distinguished church-state scholar” Philip Hamburger, asserted that while the law could accommodate religion, generally applicable laws that indirectly burdened religion were permissible and not all religious practices held absolute Constitutional protection.⁷³

The Court reaffirmed its decision three years later, once again rejecting the compelling interest test in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*.⁷⁴ At this point, Congress decided to intervene with the passage of the Religious Freedom Restoration Act of 1993 (RFRA),⁷⁵ designed to “restore the compelling interest test” and to “guarantee its application in all cases where free exercise of religion is substantially burdened.”⁷⁶ The Supreme Court responded in its 1997 ruling in *City of Boerne v. Flores*,⁷⁷ which severely restricted the enforceability of the Act. The Court found that the use of RFRA to challenge the denial of a permit to build a church in San Antonio, Texas, was unconstitutional because while Congress insisted the Fourteenth Amendment made RFRA applicable to the states, “[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is.”⁷⁸ Thus, enforcing RFRA’s interpretation of religious freedom upon the states over the Court’s interpretation in *Employment Division v. Smith* was not seen as a constitutional exercise of Congress’ power under § 5 to enforce the provisions of the Fourteenth Amendment.⁷⁹ The federal government, however, remained subject to RFRA, a fact that the Court

72. *Id.* at 1087-95.

73. *Id.* at 1095-97.

74. 508 U.S. 520, 542 (1993) (holding that a city ordinance against animal slaughter was unconstitutional not for lack of compelling interest but because it unfairly targeted the Santeria religion).

75. Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. § 2000bb to bb-4 (1993)).

76. *Id.*

77. 521 U.S. 507 (1997).

78. *Id.* at 519.

79. *Id.*

confirmed in their 2006 ruling in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*.⁸⁰

C. Free Speech and the Military

Historically, the Court has treated First Amendment free speech issues broadly in the military setting, providing deference to the Department of Defense based largely on the reasoning that the military necessity doctrine — the idea that the unique task of national defense and maintaining discipline and order in the military — allows for a narrower reading of First Amendment rights than what would apply to the general public. This principle is illustrated by *Orloff v. Willoughby*,⁸¹ a case concerning an Army doctor who alleged that his commission was denied due to suspect affiliations with Communist organizations in his past.⁸² Justice Jackson wrote in the opinion that “judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates.”⁸³ In essence, the Court chose not to rule one way or the other on whether the Army’s action was discriminatory and instead delegated the question to the exclusive authority of the military’s own disciplinary and appeals system.⁸⁴

A case hewing even more closely to free exercise and expression of morality, if not religion directly, *Parker v. Levy*,⁸⁵ concerned an Army doctor who felt orders to train Special Forces soldiers would violate his medical ethics and disobeyed them.⁸⁶ This act of principled protest led to

80. 546 U.S. 418, 424 (2006) (concerning the federal seizure of a Schedule I controlled substance found in a sacramental tea used by a New Mexico branch of the Brazilian church União do Vegetal). The Court held that the RFRA compelling interest test determined the government’s burden and, applying that test, found that the government failed to meet its burden. *Id.* at 439.

81. 345 U.S. 83 (1953).

82. *Id.* at 85, 89-90.

83. *Id.* at 93-94.

84. *Id.*

85. 417 U.S. 733 (1974).

86. *Id.* at 735-37.

his being court-martialed, convicted, and confined for three years with hard labor.⁸⁷ As then-Justice Rehnquist explained:

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.⁸⁸

The idea that the standard for First Amendment protections applied to military personnel is lower than that applied to civilians has since served as a rationale to uphold military decisions in several other cases.⁸⁹ In the words of Andrew C.S. Efaw: “The Court’s decisions clearly hold the military to be a society apart, treating the armed forces’ need for a disciplined, cohesive fighting force as justification for the loss of liberty of individual soldiers.”⁹⁰ Furthermore, in assessing military free speech cases as a whole, C. Thomas Dienes noted that there is a “marked resemblance” between them.⁹¹ He finds a lack of balancing or “explor[ing] the first amendment interests burdened by the military regulation,” with the courts choosing to instead “denigrate competing first amendment concerns . . . invoke justiciability concerns, emphasizing the dominant constitutional roles of Congress and the

87. *Id.* at 736.

88. *Id.* at 758.

89. See *Brown v. Glines*, 444 U.S. 348 (1980) (upholding Air Force regulation requiring approval from the base commander before circulating political petitions). See also *Weiss v. United States*, 510 U.S. 163 (1994) (upholding the constitutional validity of the military justice system with regard to the Appointments Clause and the Due Process Clause of the Fifth Amendment); *Chappell v. Wallace*, 462 U.S. 296 (1983) (denying a damages remedy for claims by military personnel that constitutional rights had been violated by superior officers).

90. Andrew C.S. Efaw, Comment, *Free Exercise and the Uniformed Employee: A Comparative Look at Religious Freedom in the Armed Forces of the United States and Great Britain*, 17 COMP. LAB. L.J. 648, 656 (1996).

91. C. Thomas Dienes, *When the First Amendment is Not Preferred: The Military and Other “Special Contexts,”* 56 U. CIN. L. REV. 779, 815 (1988).

Executive in controlling the military and the lack of judicial capabilities . . . [and] stress the unique and special needs of the military.”⁹² Overall, in terms of free speech broadly understood, the Court has taken the stance that its hands are tied in such a way that even contemplating the interests involved would infringe on the military’s expertise in such matters.

D. Religious Freedom and the Military

While much of the case law on religious freedoms in the military setting has followed the same pattern of deference to congressional and executive authority as other free speech cases, there have been some notable exceptions, and furthermore, instances of legislative intervention after the Court declined to act. Perhaps the most frequently cited cases involving religious expression in the military are those involving use of religious dress while in uniform. The issue was first addressed by the Ninth Circuit in the 1980 case of *Sherwood v. Brown*,⁹³ which upheld the court-martial of a Sikh sailor who refused to wear a helmet instead of his turban.⁹⁴ This holding was not explicitly based on religious rights, however, but rather in safety, affirming the District Court’s conclusion that “the Navy’s interest in safety was sufficient to meet the compelling need requirement,” since “[a]ll personnel at battle stations wear helmets to protect themselves from missiles such as shrapnel and to cushion their impact with bulkheads and overheads caused by a lurching vessel.”⁹⁵ Therefore, the military status of the plaintiff did not play into the court’s decision, as it held the regulation against the same compelling need standard used for civilians.

In 1986, the Supreme Court addressed religious dress for members of the military directly in *Goldman v. Weinberger*,⁹⁶ upholding military policy that prohibited an Orthodox Jewish soldier from wearing

92. *Id.*

93. 619 F.2d 47 (9th Cir. 1980).

94. *Id.* at 48.

95. *Id.*

96. 475 U.S. 503 (1986). *See also* *Bitterman v. Sec’y of Def.*, 553 F. Supp. 719 (D.D.C. 1982) (upholding military policy in a nearly identical case heard earlier by a district court).

his yarmulke while in uniform.⁹⁷ Unlike in *Sherwood*, this ruling was based not upon the compelling interest of safety but rather on the need to “foster instinctive obedience, unity, commitment, and esprit de corps,”⁹⁸ further arguing that “courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.”⁹⁹ In other words, while the courts might not necessarily see this interest as compelling if applied to civilian life, the particular nature and needs of the military in this instance required the courts to defer to the military under the military necessity doctrine.

Congress, on the other hand, did not see it fit to defer to military authority and eventually enacted a statute stating that members of the armed forces “may wear an item of religious apparel while wearing the uniform of the member’s armed force,”¹⁰⁰ provided said item is “neat and conservative.”¹⁰¹ Between this and the Religious Freedom Restoration Act, the door seems, at least in theory, to be open to the Court giving less deference to the military in religious freedom decisions. There has not yet been an opportunity for this to play out. What’s more, while the House and Senate Judiciary Committees both discussed the military context of RFRA before its passage, their comments shed little light on how things would or could change. The House Committee states that “examination of such regulations in light of a higher standard does not mean the expertise and authority of [the] military . . . will be necessarily undermined”¹⁰² as military necessity remains a compelling interest but also warns that “[s]eemingly reasonable regulations based upon speculation, exaggerated fears of [sic] thoughtless policies cannot stand. Officials must show that the relevant regulations are the least restrictive means of protecting a compelling governmental interest.”¹⁰³ The Senate Judiciary Committee report then further complicates matters by asserting that while the compelling

97. *Goldman*, 475 U.S. at 509-10.

98. *Id.* at 507 (citing *Chappell v. Wallace*, 462 U.S. 296, 300 (1983); *Greer v. Spock*, 424 U.S. 828, 843-44 (1976) (Powell, J., concurring)).

99. *Id.* (citing *Chappell*, 462 U.S. at 305; *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953)).

100. 10 U.S.C. § 774(a) (2006).

101. *Id.* at § 744(b)(2).

102. H.R. REP. NO. 103-88, at 8 (1993).

103. *Id.*

interest standard should be applied to the military, "the courts have always extended to military authorities significant deference in effectuating these interests. The committee intends and expects that such deference will continue under this bill."¹⁰⁴

Beyond the cases involving military dress, there are others in which religious freedoms were upheld in a military setting, albeit in situations that often set the two religious freedom clauses in the First Amendment against one another. This is best exemplified in the case of *Katcoff v. Marsh*,¹⁰⁵ in which the Second Circuit upheld the military chaplain system over the argument that it stood as a violation of the Establishment Clause.¹⁰⁶ The Court reasoned that the intention of the program was not to establish a state church in violation of the First Amendment, but rather to defend the First Amendment right to free exercise of religion by providing soldiers with opportunities to participate in their religious traditions while deployed.¹⁰⁷ The *Katcoff* opinion also upheld much of the judicial deference of the religious dress cases, quoting Justice Jackson's words in *Orloff* regarding the distinct nature of the military community.¹⁰⁸

Acting as a sort of balance to the Establishment-Free Exercise tension found in *Katcoff* is the earlier case of *Anderson v. Laird*,¹⁰⁹ heard by the D.C. Circuit, which held that soldiers, even in the academic settings of the service academies, cannot be forced to attend religious ceremonies.¹¹⁰ In separate opinions, two of the three judges found this practice to be a firm violation of the Establishment Clause.¹¹¹ Chief Judge Bazelon saw the issue as an absolute, without consideration for military necessity: "Attendance at religious exercises is an activity which under the Establishment Clause a government may *never* compel."¹¹² In

104. S. REP. NO. 103-111, at 12 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1901.

105. 755 F.2d 223 (2d Cir. 1985).

106. *Id.* at 224. The court's opinion in this case quoted extensively from Justice Brennan's concurrence in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963). *See supra* notes 52-58 and accompanying text.

107. *Katcoff*, 755 F.2d at 231-32.

108. *Id.* at 233. *See Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1933).

109. 466 F.2d 283 (D.C. Cir. 1972).

110. *Id.* at 284.

111. *Id.* at 283-84.

112. *Id.* at 285.

his concurring opinion, Judge Leventhal gave more weight to the military's needs, but nonetheless concluded that "[t]he government simply has not made the required showing that its interference with religious freedoms is compelled by, and goes no further than what is compelled by, the effective training of military officers needed for survival."¹¹³

The Supreme Court took up neither *Katcoff* nor *Anderson*, but the cases set the tone for religious expression in the armed forces — enough availability to permit Free Exercise but not a pervasive enough presence to create compulsion and, thus, a violation of the Establishment Clause. In other words, the balance is established between a freedom to worship and a freedom from being coerced into any specific worship, this time in the military setting. More recent cases have continued to retain these basic boundaries, while adding further nuance that may prove instructive in assessing current controversies.

In the 1995 case of *Hartmann v. Stone*,¹¹⁴ the Sixth Circuit took on the issue of religious expression in the form of the Army Family Child Care on-base daycare program. The court struck down a regulation that prohibited providers of Army childcare from conducting religious activities and practices in their facilities.¹¹⁵ Interestingly, in this case the court did override the military necessity doctrine, asserting that the discriminatory nature of the regulation against religious persons trumped any compelling reason the military might have for the policy.¹¹⁶ This was in part because the providers within the Family Child Care program were civilians, and thus the court saw the regulations restricting their religious expression as extending outside the military's proper locus of control.¹¹⁷ The fact that the military necessity doctrine did not hold sway, even if only for the benefit of civilians working under a military program, may demonstrate that there are in fact areas in which the military has no compelling reason to be granted deference.

With regard to Establishment Clause issues, in 2003 the Fourth Circuit held in *Mellen v. Bunting*¹¹⁸ that mandatory evening prayers

113. *Id.* at 303 (Leventhal, J., concurring).

114. 68 F.3d 973 (6th Cir. 1995).

115. *Id.* at 975.

116. *Id.* at 983-94.

117. *Id.* at 985.

118. 327 F.3d 355 (4th Cir. 2003).

conducted at the Virginia Military Institute (VMI) violated the Clause and constituted a state endorsement of religion.¹¹⁹ In its analysis, the court used tests established for religious presence in state-funded institutions,¹²⁰ as well as school prayer cases,¹²¹ and determined that the prayers were “plainly religious in nature”¹²² and sent “the unequivocal message that VMI, as an institution, endorses the religious expressions embodied in the prayer.”¹²³ While school prayer has long been seen as a coercive religious activity when conducted in this fashion, VMI’s adversative method of education, which “emphasizes the detailed regulation of conduct and the indoctrination of a strict moral code,” leaves its students “uniquely susceptible to coercion,” making the argument even stronger that students are “plainly coerced into participating in a religious exercise.”¹²⁴ Although VMI is a Virginia state college with close affiliation to the military, the argument that a coercive environment such as VMI may enhance unauthorized endorsement of religion while inhibiting those who feel their rights have been infringed upon from speaking up is of particular note here, especially when one recalls, for instance, how quickly those put on lockdown along with Private Smith relented in their pursuit of filing a formal complaint.¹²⁵

E. Interpretation of Religious Freedom in Military Policy

The military, for its part, has made efforts to wisely use the discretion granted to it by the courts. The Department of Defense directive issued in response to the legislation on military dress after *Goldman*, for instance, went beyond the immediate issue at hand in that

119. *Id.* at 374-75.

120. *See* *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (stating that prayer in public institutions must have a secular purpose, must neither advance nor inhibit religion, and must not foster an excessive government entanglement with religion).

121. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (finding student-led prayer at home football games violates the Establishment Clause); *Lee v. Weisman*, 505 U.S. 577 (1992) (holding that prayers at middle and high school graduation ceremonies violate the Establishment Clause).

122. *Mellen*, 327 F.3d at 374 (quoting *Stone v. Graham*, 449 U.S. 39, 41 (1980)).

123. *Id.*

124. *Id.* at 371.

125. *See supra* notes 14-41 and accompanying text.

case and developed a clear policy for military leadership to follow in confronting all religious freedom issues.¹²⁶ In addition to supplying commanders with definitions for what constitutes “neat and conservative” apparel, the directive plainly states that “[i]t is DoD policy that requests for accommodation of religious practices should be approved by commanders when accommodation will not have an adverse impact on mission accomplishment, military readiness, unit cohesion, standards, or discipline.”¹²⁷

The policy is described in even greater detail in a November 1998 article in *Army Lawyer*, a publication written to assist Army lawyers in performing their legal duties, in which Major Michael J. Benjamin provides a clear analytical framework for military officers to use in identifying and confronting religious freedom and accommodation issues.¹²⁸ Benjamin divides the article, both in case history and in issue analysis, between accommodation/free exercise issues, establishment of religion issues, and hybrid issues, reflecting the duality of religious freedom in the Constitution and the balance between free exercise and establishment discussed in *Katcoff*. For issues regarding accommodation of the free exercise of religion, Benjamin provides plain instructions to “[r]esolve at the lowest possible level – presume accommodation,” while suggesting three preliminary criteria for consideration: sincerity, basis in religion, and impact on mission.¹²⁹

Establishment Clause problems are admittedly more difficult, as there is no specific regulation in the military to use as a guide, and an issue could arise in response to either a single isolated incident or a larger policy decision.¹³⁰ Benjamin focuses on four key problem areas and provides a response for each.¹³¹ First, all religious activities must be

126. See DEP’T OF DEF., INSTRUCTION NO. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES (Feb. 10, 2009), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/130017p.pdf>.

127. *Id.* at 1-2. The same section notably is very specific in saying “The U.S. Constitution proscribes Congress from enacting any law prohibiting the free exercise of religion,” implying that military regulations may not fall under that same constitutional scope. *Id.*

128. Maj. Michael J. Benjamin, *Justice, Justice Shall You Pursue: Legal Analysis of Religion Issues in the Army*, ARMY LAW., Nov. 1998, at 1.

129. *Id.* at 14.

130. *Id.* at 16.

131. *Id.*

voluntary, free of even “[s]ubtle coercion and indirect rewards,” and “[n]on-belief or non-participation should not result in punishment.”¹³² Second, the chaplain program (as well as all religious displays) must strive to be as inclusive and service as many soldiers of different faiths and denominations as possible.¹³³ If a chaplain cannot provide a particular religious service, he is responsible for finding someone who can.¹³⁴ Third, military religious programming must be limited to members of the military and their families and cannot provide religious support of local civilian communities.¹³⁵ Finally, while military and patriotic ceremonies are not to be conducted as religious services, “invocations, prayers, and benedictions” are permitted, provided they remain “relatively short and non-denominational” and do “not reference divinity by any sectarian name (Jesus, Allah) but rather use ‘generic’ terms (Father, Almighty, Source of Goodness).”¹³⁶

Finally, in hybrid cases – described as instances in which one soldier contends that open discussion and evangelizing is a component of his free exercise, while another feels that it violates his rights under the Establishment Clause – Benjamin determines authority and rank to be determinative factors.¹³⁷ If the evangelizing soldier is a military superior, his religious expression is likely to affect his subordinates; it is improper if it either violates the standard of voluntariness discussed in the Establishment Clause analysis or is perceived as coming from his capacity as an official rather than as an individual, which would amount to a government endorsement.¹³⁸ If the individual expressing his religion is a peer or civilian, the issue falls more under free speech, and the expression can be restricted by a superior if ““he perceives [it] to be a clear danger to the loyalty, discipline, or morale of troops . . . under his command.””¹³⁹ “The religious soldier cannot use the Free Exercise Clause as a sword to protect his comments if they have a disruptive

132. *Id.*

133. *Id.* at 16-17.

134. *Id.* at 17.

135. *Id.*

136. *Id.* at 17. The article also notes that “[t]he Army chaplaincy apparently does not have written rules that govern prayer at non-religious ceremonies. Guidance is passed on through informal training and observation.” *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 18 (quoting *Brown v. Glines*, 444 U.S. 348, 353 (1979)).

effect on the unit,”¹⁴⁰ the article summarizes. “Nor should the command use the Establishment Clause to restrict religious comments, aside from their effect on morale and cohesion.”¹⁴¹

With such clear regulations, procedures, and analytical framework, it is puzzling that contentious issues such as those alleged by the Military Religious Freedom Foundation persist and are left almost entirely unaddressed by military command. Two other major factors, that are necessary to note, complicate the treatment of religious freedom in the military. The first is that the bulk of the framework discussed above is only one military lawyer’s analysis of his branch’s interpretation of the Department of Defense directive, which itself was an interpretation of an act of Congress.¹⁴² More significant, however, is the apparent lack of oversight to ensure that such policies will be implemented properly. If a commanding officer, or branch secretary, or even the Secretary of Defense decided that the directives and policies regarding religious freedom were not to his or her liking, what would prevent him or her from ignoring them if Courts are unwilling to intervene in military operations?

III. CURRENT CASES AND LEGAL STRATEGIES

Turning back to the recently dismissed and potential future lawsuits filed by the Military Religious Freedom Foundation, several relevant points emerge in light of the preceding case law and policies. First, any incident that has not first been reported up through the military chain of command is unlikely to be considered ripe and, thus, is unlikely to be given consideration by the court, a point made more evident by the presence of specific procedures and practices for handling religious accommodation complaints. Second, if the incident is one that the

140. *Id.*

141. *Id.*

142. See Maj. David E. Fitzkee & Cpt. Linell A. Letendre, *Religion in the Military: Navigating the Channel Between the Religion Clauses*, 59 A.F. L. REV. 1 (2007) (interpreting religious policy as Air Force Academy law professors, covering much of the same ground, but in much more theoretical terms); Cdr. William A. Wildhack III, *Navy Chaplains at the Crossroads: Navigating the Intersection of Free Speech, Free Exercise, Establishment, and Equal Protection*, 51 NAVAL L. REV. 217 (2005) (writing on religious freedom issues as pertaining to the naval chaplaincy).

military failed to remedy, it must not only be specific, but it must also fall within a relatively narrow band of activities that cross the line from mere religious practice and observation to coercion or denial of accommodation. Finally, it would take an extraordinary argument in the end to persuade the court to break its practice of deferring to the military, and the desired ends may be more readily achievable by means of an act of Congress or the executive. However, this does not mean that making such an argument is wholly impossible or without merit.

A. Ripeness, Justiciability, and Exhaustion of Military Remedies

The primary issue raised in the Justice Department's motion to dismiss in both Specialists Hall's and Chalker's cases was one of justiciability — specifically, whether or not a soldier could bring a civil claim against the Department of Defense and/or his superior officers in civilian federal court. In Chalker's suit, the Justice Department concluded that under the test devised in *Mindes v. Seaman*,¹⁴³ Chalker's claims were barred because he had not first exhausted the available intramilitary remedies.¹⁴⁴ The threshold test under *Mindes* for contemplating review of an internal military decision requires a court to determine "(1) whether the case involves an alleged violation of a constitutional right, applicable statute or regulation, and (2) whether intra-service remedies have been exhausted."¹⁴⁵ The *Mindes* test is essentially a military-specific ripeness standard, declaring that in any case that the military has not had the opportunity to fully hear out, the injury is still premature to be heard by the federal courts.¹⁴⁶ Chalker did not meet this threshold test in any of the three incidents for which he was seeking relief in his suit. His complaint stated only that he sought relief from attendance at the events with "unsatisfactory" results, with no

143. 453 F.2d 197 (5th Cir. 1971).

144. Memorandum and Order, *supra* note 39, at 14-15. The district court in *Chalker* applied the *Mindes* test because it was adopted as binding precedent within all Tenth Circuit courts. *Id.* at 11. *See Lindenau v. Alexander*, 663 F.2d 68 (10th Cir. 1981).

145. Memorandum and Order, *supra* note 39, at 11 (citing *Lindenau*, 663 F. 2d at 71).

146. *Mindes*, 453 F.2d at 201. *See supra* note 41 and accompanying text.

evidence of what intramilitary remedies had even been attempted.¹⁴⁷ Defendants countered with affidavit testimony from Chalker's commander and chaplain, who testified that Chalker filed no religious accommodation requests or Equal Opportunity complaints in relation to the incidents named in the case, which the plaintiffs provided no evidence to refute.¹⁴⁸ Additionally, the court rejected Chalker's claim that his case fell under a "futility exception" established by *Walmer v. United States Department of Defense*,¹⁴⁹ stating that the conclusory allegations offered in the complaint were not enough to establish that the appeals process would have been "clearly useless," as *Walmer* requires.¹⁵⁰

With this line of reasoning established in the failed Chalker claim, the most pertinent question facing a future litigant should be whether or not he or she has actually exhausted all intramilitary remedies or can substantiate a claim that doing so would be futile. The best chance a soldier has at a justiciable claim in the civilian courts is in an instance in which he or she was faced with religious discrimination and sought a remedy within the military setting, and his or her complaints were not sufficiently dealt with in accordance with existing military policies. Looking specifically at the case of Private Anthony Smith, for example, there is some evidence that military remedies were available and pursued.¹⁵¹ Smith also alleges, however, that those efforts were met with a fair amount of resistance that led many soldiers to drop their claims.¹⁵² That resistance could be seen as a failure to use proper military policy and could lend credence to an exception under the *Walmer* futility rule, particularly if supplemented by the additional evidence regarding a pervasive evangelical Christian culture in the armed forces that would feasibly contribute to such complaints being brushed off.¹⁵³ In Private

147. Memorandum and Order, *supra* note 39, at 11.

148. *Id.* at 12. Chalker filed a request for religious accommodation, which he received, and an Equal Opportunity complaint, which was determined to be unfounded, in relation to a separate event not involved in this case. *Id.*

149. 835 F. Supp. 1307, 1310-11 (D. Kan. 1993).

150. Memorandum and Order, *supra* note 39, at 13.

151. *See supra* note 4-6 and accompanying text.

152. *See supra* note 4-6 and accompanying text.

153. Complaint for Injunctive Relief at 4-14, *Chalker v. Gates*, No. 08-CV-2467-KHV-JPO (D. Kan. Sept. 25, 2008), *available at* http://www.militaryreligiousfreedom.org/legalfiles/complain_sept08.pdf. It is

Smith's case, given that the Army was conducting an investigation into the incident, as of March 2011, it would appear that intramilitary resolution was still within reach, and any litigation in this specific instance would have to come after the investigation concluded, and the findings or remedies offered were unsatisfactory to Smith based on how they were handled.¹⁵⁴

B. The Nature of the Complaint

In addition to justiciability issues, a successful claim would have to be not only based on a specific incident but also would have to be either an act that crossed the line between religious accommodation and religious coercion or an unjustified denial of religious accommodation. Of the two possibilities, the former is the one chiefly pursued by the Military Religious Freedom Foundation in its claims to date. The latter category of action remains more or less untested, despite a missed opportunity in the claims made by Specialist Jeremy Hall.¹⁵⁵

Religious coercion is the exclusive legal strategy pursued by Specialist Chalker in his claims against the Department of Defense. His initial complaint, filed in September 2008, cited three instances within the preceding year of military functions that he was required to attend by his chain of command that included "Christian sectarian prayers."¹⁵⁶ This was followed by an allegation that these instances are "evidence of a pattern and practice of constitutionally impermissible promotions of religious belief within the Department of Defense and the United States

important to separate Weinstein's more passionate incendiary charges, *see* Sharlet, *supra* note 19, from the legitimate instances that are a cause for concern, *see, e.g.*, Complaint for Injunctive Relief, *supra* note 36.

154. The investigation was ordered by Lt. Gen. John E. "Jack" Sterling, Training and Doctrine Command Chief of Staff, and while few details were offered, Col. Thomas Collins, an Army spokesman at the Pentagon, is quoted as acknowledging that the incident "is not consistent with Army policy." Gould, *supra* note 1.

155. Hall's missed opportunity refers to his choosing to file suit based on free speech and assembly rights, as opposed to a lack of Free Exercise accommodation granted to his beliefs as an atheist and freethinker. *See infra* notes 170-75 and accompanying text.

156. Complaint for Injunctive Relief, *supra* note 153, at 3.

Army,”¹⁵⁷ and a ten-page list cataloging, in great detail, seventeen additional instances of said patterns and practices from all parts of the military, although Specialist Chalker did not directly experience all of them.¹⁵⁸ The court’s dismissal notes that if all these instances were treated as claims, Chalker would not have standing to make them as a party, as they do not show a personal stake or personalized injury on the part of Chalker.¹⁵⁹ This determination is firmly grounded in federal standing doctrine, which prevents a case from being heard “when the asserted harm is a generalized grievance shared in a substantially equal measure by all or a large class of citizens.”¹⁶⁰ However, the court also acknowledged that “plaintiffs offer the ‘pattern and practice’ allegations (as well as allegations related to three specific events which Chalker personally attended) [as evidence] to support their two causes of action,” as opposed to separate and distinct claims for which they seek relief.¹⁶¹ While the court does not exclude the possibility that Chalker’s allegations may be “superfluous and irrelevant” to his cause of action, they do not affect standing so long as they are accompanied by claims that do demonstrate standing.¹⁶² Including additional general claims about religious influence in the military might not hurt future claims, but it does not guarantee that they will be considered pertinent to an actual specific claim, and they are useless without one. Thus, the primary focus in a theoretical future claim should be on actual events experienced by the plaintiff, with additional generalized claims being included more specifically as evidence to support a futility claim under *Walmer*, if at all.

As for Chalker’s personal claims of religious discrimination – the sectarian Christian prayers – the District Court makes no comment on

157. *Id.* at 4.

158. *Id.* at 4-14. The allegations, single-spaced, comprise the majority of the text of the sixteen-page complaint and include: “Religious Book Endorsements and Official Military Emblems on Religious Books”; the presence of the Campus Crusade for Christ Military Ministry at all major U.S. military training installations and its involvement with the military chaplain program; and the evangelical Christian influence on the Army “Strong Bonds” pre-deployment and post-deployment family wellness and marriage training program. *Id.*

159. Memorandum and Order, *supra* note 39, at 8-9.

160. *CHEMERINSKY*, *supra* note 40, at § 2.3.5 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

161. Memorandum and Order, *supra* note 39, at 9.

162. *Id.* at 10.

their validity, having found his failure to exhaust military remedies as sufficient grounds to dismiss his claim.¹⁶³ However, previous cases and guidelines on military prayer suggest that under certain conditions, the presence of prayer at a mandatory event could be an event sufficient to support a claim of infringement on religious freedoms. As previously noted, the analysis of Major Benjamin in *Army Lawyer* explicitly states that “invocations, prayers, and benedictions” are permissible at official military and patriotic ceremonies, but it also provides the caveat that they need to be “relatively short and non-denominational” and “not reference divinity by any sectarian name (Jesus, Allah) but rather use ‘generic’ terms.”¹⁶⁴ Chalker does not provide any more information on his claim about the prayer itself, beyond the claim that it was “sectarian Christian” in nature,¹⁶⁵ so more details would be needed to determine whether the prayer violated Army guidelines. Additionally, while the decision on prayer at VMI in *Mellen v. Bunting*¹⁶⁶ may lend some credence to Chalker’s argument, given that it concerns mealtime prayer,¹⁶⁷ the decisive factor in *Mellon* was the uniquely coercive educational environment of VMI.¹⁶⁸ This is not intended to suggest that the uniquely coercive argument is exclusive to VMI, as will be discussed later. Private Smith’s case would be more likely to gain traction as a religious coercion incident if not resolved by intramilitary means – the analysis in *Army Lawyer* is very clear in its discussion of the Establishment Clause, stating that “non-participation should not result in punishment.”¹⁶⁹

163. *Id.* at 14-15.

164. Benjamin, *supra* note 128, at 17. *See supra* note 136 and accompanying text.

165. Complaint for Injunctive Relief, *supra* note 153, at 3-4.

166. 327 F.3d 355, 371 (4th Cir. 2003).

167. One of Chalker’s cited complaints is described as taking place at a barbeque as opposed to a military ceremony. *See* Complaint for Injunctive Relief, *supra* note 153, at 3.

168. *Mellon*, 327 F.3d 355. *See supra* note 124 and accompanying text.

169. Benjamin, *supra* note 128, at 16. *See supra* note 132 and accompanying text. This analysis reflects specific regulatory prohibitions against proselytizing by the chaplaincy. *See, e.g.*, U.S. DEP’T OF THE ARMY, PAM. NO.165-16, MORAL LEADERSHIP/VALUES STAGES OF THE FAMILY LIFE CYCLE 1 para. 1-2 (1987) (“Chaplain instructors have a responsibility to avoid any action, which would tend to confuse [leadership and ethics] training with religious instruction.”). *But see* Lupu & Tuttle, *supra* note 49, at 123 (“[Proselytizing] arises within a vacuum of regulation,

Things become more interesting when we turn back to the dropped complaint by Specialist Jeremy Hall. Unlike Chalker's, Hall's complaints did not concern mandatory attendance at an event containing sectarian Christian practice but rather a commanding officer's disruption of an atheist event that he organized.¹⁷⁰ While the complaint states as its causes of action a denial of Hall's free assembly and speech rights, denial of his right to be free of government-sponsored religion, and denial of equal protection given the freedom of religious groups to hold meetings,¹⁷¹ the complaint does not attempt to assert a cause of action for infringement of Hall's free exercise of religion. While atheism is commonly believed to be the absence of religious faith, in this case Hall's activities had all the organizational characteristics of any other faith requiring accommodation within the armed forces.¹⁷² The event was designed to gather a group of likeminded persons, and it had the backing of an established national and even intramilitary organization dedicated to its philosophy — the Military Association of Atheists and Freethinkers.¹⁷³ Hall presumably sought this gathering for the same reasons other religious gatherings are sought while deployed — to discuss common viewpoints and find comfort in community in the context of intense military combat operations. Indeed, Specialist Hall

and even of official guidance, covering the chaplain's engagement with service members.").

170. Amended Complaint for Injunctive Relief at 5-6, *MRFF v. Gates*, No. 07-2444-JWL (D. Kan. Sept. 25, 2007), *available at* <http://www.militaryreligiousfreedom.org/legalfiles/complain.pdf>. *See also* Banerjee, *supra* note 21 (providing an account of the same incident in *The New York Times*).

171. Amended Complaint for Injunctive Relief, *supra* note 170, at 7.

172. Atheism has been recognized as a religion for Free Exercise purposes, most recently by the Seventh Circuit in August 2005. *See Kaufman v. McCaughtry*, 419 F.3d 678, 682 (7th Cir. 2005) ("[T]he Court has adopted a broad definition of 'religion' that includes non-theistic and atheistic beliefs, as well as theistic ones."). *See also McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) ("The touchstone for our analysis is the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.") (internal quotations omitted); *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985) ("But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.").

173. *See supra* note 22 and accompanying text.

went about the same procedures to conduct and advertise for his meeting as other religious groups would, gaining the permission of an Army chaplain to do so.¹⁷⁴

If Hall's action was merely one of free speech through public assembly, the military has a fairly established basis under *Orloff* and *Parker* to claim necessity to curtail his actions.¹⁷⁵ In terms of religious accommodation, however, if Hall's event had already been found to qualify for accommodation,¹⁷⁶ then its disruption, had Hall pursued his complaint through the military's internal procedures, would in theory be handled in the same manner as if a Jewish, Muslim, or Christian event had been interrupted and met with resistance from a superior officer. It would be a violation of policy and a denial of religious accommodation that Hall and every soldier is afforded as a member of the military. Additionally, under the view that atheism is deserving of the same free exercise accommodations as any other religion, atheist soldiers would be entitled to being excused from any instances of more than ceremonial religious observance as part of a mandatory military event – again, questionable for prayer, but fairly certain in the case of a Spiritual Fitness Concert.

C. Overcoming Military Necessity

Even if a soldier had a legitimate cause of action, either of religious coercion or a denial of accommodations for the free exercise of religion, and the soldier exhausted all intramilitary options without a satisfactory resolution (or somehow had proven those efforts to be futile), there is no guarantee that the federal courts, up to and including the United States Supreme Court, would find in the soldier's favor. Military necessity looms large over any case concerning a soldier's First Amendment rights. The courts have only seen fit to overrule military necessity in the narrowest of circumstances, as shown in *Hartmann*, in

174. Amended Complaint for Injunctive Relief, *supra* note 170, at 4.

175. See *supra* notes 81-92 and accompanying text.

176. Here, there is admittedly some question as to whether the permission of a chaplain qualifies as proper approval. Nevertheless, Hall has a presumption of accommodation in his favor, and seems to fulfill the criteria of sincerity, basis in belief, and minimal detrimental impact on mission. See Benjamin, *supra* note 128, at 14.

order to prevent the military from regulating civilian conduct (and religious conduct to boot).¹⁷⁷ Even the religious freedom enjoyed by members of the military today has its roots not in the courts but in a congressional response to the Supreme Court's denial of religious freedom under the reasoning of military necessity in *Goldman*.¹⁷⁸ Furthermore, the December 2010 repeal of the military's "Don't Ask, Don't Tell" policy, an officially supported discriminatory practice that had long been defended on a military necessity rationale – specifically that the freedom for soldiers to publicly express their sexual orientation would adversely affect military readiness – took place not in the courts but in the United States Congress.¹⁷⁹ That said, while public activism and congressional lobbying for hearings or legislation may end up being a more effective means of obtaining greater accountability for military religious freedom, there is still a case to be made before the court for overriding the military necessity argument in defense of the right to personal beliefs.

While the crack in the wall of military necessity that *Hartmann* made was a tiny one, it is nonetheless critical that there are in fact some areas where the imposition of military regulations over civilian rights is not necessary. Granted, exempting civilians who provide childcare to military families from military regulations is very different from exempting certain areas of the lives of enlisted soldiers from military

177. See *Hartmann v. Stone*, 68 F.3d 973, 983-86 (6th Cir. 1995) (holding that religious practices in on-base daycare did not create government entanglement with religion, and restricting it was an unconstitutional infringement of First Amendment rights).

178. 10 U.S.C. § 774 (2010) (allowing the wearing of "neat and conservative" religious garments while in uniform, unless "the wearing of the item would interfere with the performance of the member's military duties"). See *supra* notes 96-101 and accompanying text.

179. Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1670 (codified as 10 U.S.C. § 654 (1993)), *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515. See Sheryl Gay Stolberg, *Obama Signs Away 'Don't Ask, Don't Tell'*, NYTIMES.COM Dec. 23, 2010, available at 2010 WLNR 25279469; Elisabeth Bumiller, *Pentagon Sees Little Risk in Allowing Gay Men and Women to Serve Openly*, N.Y. TIMES, Dec. 1, 2010, at A21 (noting that Secretary of Defense Robert Gates stated one of the key reasons for pushing for repeal in Congress was to avoid a fight in the courts, and the repeal being "imposed immediately by judicial fiat," suggesting some uncertainty as to whether military necessity would be upheld in this case if it had come before the Court).

regulation. The latter is a far greater hole in the military necessity wall. That does not mean, however, that it is not worth pursuing. The rationale in *Parker v. Levy* for giving deference to the military in restricting First Amendment freedoms is based on the “fundamental necessity for obedience, and the consequent necessity for imposition of discipline.”¹⁸⁰ This need is reflected in military policy on religious freedom stemming from Department of Defense directive, striking a balance that allows soldiers to possess and express their own religious beliefs to the extent that this does not interfere with obedience, discipline, and the mission at hand.¹⁸¹ One might even imagine that Justice Scalia, author of the *Employment Division v. Smith* opinion, would be pleased to know that no man in our armed forces is being permitted “to become a law unto himself.”¹⁸² The problem arises when policies on paper are not executed in practice, either because complaints from soldiers are not being handled properly, or because a culture has developed in which soldiers see no benefit in protest. When this takes place, the danger in granting too much deference to the military to manage itself becomes as severe as the danger when it is not given enough.

Similarly to *Hartmann*, the *Mellen* case opens a small but critical window from which to make a case against military necessity in religious freedom issues.¹⁸³ The prayers conducted at VMI, aside from being of a particularly overt Christian nature, were stopped by judicial intervention primarily due to the culture at VMI, which “emphasizes the detailed regulation of conduct and the indoctrination of a strict moral code,”¹⁸⁴ leaving it open to the same line of reasoning applied to school prayer cases. Although VMI’s adversative educational methods are certainly more severe than standard military levels of discipline, the armed forces nonetheless are coercive in nature and, thus, capable of unnecessarily denying their members’ liberties. William J. Dobosh, Jr., an Army judge

180. 417 U.S. 733, 758 (1974).

181. See *supra* notes 126-27 and accompanying text.

182. 494 U.S. 872, 885 (1990) (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

183. *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003).

184. *Id.* at 371.

advocate, made this argument forcefully.¹⁸⁵ Dobosh asserted that the same military-civilian divide that justifies the military necessity doctrine feeds an ongoing military socialization process which “constantly directs, forms, and develops the actions and perspectives of its members.”¹⁸⁶ Because of this, “[t]he Army’s social environment presents particular dangers of coerced religious activity and the perception of governmental religious endorsement.”¹⁸⁷ Maintaining close regulation of the military’s treatment of religious freedom and allowing for a civilian judicial fallback to keep the military accountable does not threaten the discipline and order necessary to provide a national security force; in Dobosh’s eyes it would “signify the Army’s desire to have all of its soldiers, regardless of personal religious beliefs, feel like fully accepted members of the Army team” while preserving their dignity and morale.¹⁸⁸ When weighing military necessity and personal liberties, in the case of religious freedom, the theoretical disciplinary benefits of the status quo are simply too greatly outweighed by the costs.

CONCLUSION

The struggle to embrace religious pluralism while maintaining a uniquely American set of values and ideals has endured throughout our history, from the earliest Protestant colonists fleeing religious persecution in Europe,¹⁸⁹ to the embrace of Catholic and Jewish immigrant populations in the early 20th century,¹⁹⁰ to the ongoing fear

185. William J. Dobosh, Jr., *Coercion in the Ranks: The Establishment Clause Implications of Chaplain-Led Prayers at Mandatory Army Events*, 2006 WIS. L. REV. 1493, 1526-27 (2006).

186. *Id.*

187. *Id.* at 1527-28.

188. *Id.* at 1560.

189. See, e.g., Library of Congress, Religion and the Founding of the American Republic, <http://www.loc.gov/exhibits/religion/religion.html> (last visited Mar. 26, 2011) (detailing in an online exhibition the colonization of North America for religious refuge).

190. See, e.g., CHESTER GILLIS, ROMAN CATHOLICISM IN AMERICA 68-94 (1999) (detailing the Catholic experience from the beginning of the 20th Century to the advent of Vatican II); Jonathan D. Sarna & Jonathan Golden, *The American Jewish Experience in the Twentieth Century: Antisemitism and Assimilation*, NAT’L HUMAN. CTR., Oct. 2000, <http://nationalhumanitiescenter.org>

and suspicion of Muslim Americans in the wake of extremist terrorist attacks embodied by the “Ground Zero mosque” controversy.¹⁹¹ This struggle is only amplified in the military setting, where the need to establish a unified sense of mission and discipline in preparation for the battlefield runs deep into the hearts and minds of each individual member of the armed forces. It is because of this need that the courts have granted the military greater latitude and deference to restrict First Amendment freedoms in the military setting, and those electing to serve understand that in doing so, they consent to certain restrictions.

At the same time, we must not forget that our soldiers remain citizens, and while their freedoms of speech and expression may be heavily regulated, they should remain free to hold their own personal opinions and spiritual beliefs. A heavily coercive military culture in which expression of minority faiths — including the absence of religious faith — is not adequately accommodated, in tandem with evangelical Christianity being given a level of pervasiveness that transcends accommodation and enters into the realms of persuasion and coercion, runs dangerously close to one in which our men and women in uniform are restricted not just in how to express their beliefs but also in how they can and cannot think.

The litigation presented to date by the Military Religious Freedom Foundation may have been premature. Eager to make a splash in the courts and convinced of the totally dominant influence of evangelical Christianity at all levels of the military, Mikey Weinstein went all-in on the claims of Specialists Hall and Chalker before either attempted to redress the issue with a formal Equal Opportunity complaint.¹⁹² On the other hand, while both claims have at least the potential to constitute valid infringements of religious freedom, there is no evidence short of the lack of documented complaints that the current religious freedom policies are being implemented properly. The pressure

/tserve/twenty/tkeyinfo/jewishexp.htm (providing an overview of discrimination and acceptance of Jewish Americans in the 20th Century).

191. This is the (admittedly inaccurate) name given in the press to the 2010 controversy over plans to construct a Muslim Community Center in the same neighborhood where the Twin Towers once stood. See Romesh Ratnesar, *Ground Zero: Exaggerating the Jihadist Threat*, TIME.COM, Aug. 18, 2010, <http://www.time.com/time/nation/article/0,8599,2011400,00.html>.

192. See *supra* notes 25 and 148 and accompanying text.

to not file complaints experienced by Private Anthony Smith and his fellow soldiers indicate at least some efforts to suppress such conflicts.

Meanwhile, large-scale and explicitly Christian events continue to be held on military bases, attracting controversy.¹⁹³ Recently released survey data from the United States Air Force Academy indicates a persistent sense of religious coercion and discrimination.¹⁹⁴ And the future only holds more challenges to religious expression in the military, not just from minority religious groups and atheists, but from conservative evangelical Christians as well. In the lead-up to the repeal of “Don’t Ask, Don’t Tell,” conservative religious groups vocally questioned how chaplains who disagree with homosexuality as a matter of religious faith would be accommodated,¹⁹⁵ and they have continued to

193. See, e.g., Laurie Goodstein, *North Carolina: Group Protests Planned Religious Rally at Fort Bragg*, N.Y. TIMES, Sept. 24, 2010, at A16 (describing opposition to an evangelistic rally to be held at Fort Bragg in North Carolina by the Billy Graham Evangelistic Association); Press Release, Freedom From Religion Foundation, FOIA Documents Army’s ‘Rock the Fort’ Subsidy (Jan. 25, 2011), available at <http://www.ffrf.org/news/releases/ffrf-foia-documents-armys-rock-the-fort-subsidy/>. The Freedom from Religion Foundation described the Fort Bragg event:

Army organizers of the event apparently spent over \$6,450 of public money on food, benefitting local pastors, volunteers and guests. Hotel rooms for 39 “guests” cost taxpayers \$7,168, and “escort vans” for artists cost \$1,360. Apparently, one “worship service leader” was given a \$1,500 honorarium. The Army spent over \$12,000 on advertising the event.

Id.

194. See Jonathan Easley, *Air Force Academy in Colorado Springs Addresses Diversity Issues*, COL. SPRINGS BUS. J., NOV. 10, 2010, available at 2010 WLNR 22910428 (noting a survey that revealed “[a]lmost half of the cadets polled said that there is a low tolerance for non-Christian beliefs” in the Academy). See also Scott Fontaine, *Group: Cadets Pressed to Conform on Religion*, AIR FORCE TIMES, Oct. 11, 2010, at 25, available at 2010 WLNR 21319640 (describing the Air Force Academy’s initial resistance to releasing the survey, and the Military Religious Freedom Foundation’s pressures to publish the data, as well as reports of students posing as evangelicals to avoid persecution by classmates).

195. See Daniel Blomberg, Editorial, *If Gays Serve Openly, Will Chaplains Suffer?*, USA TODAY, July 12, 2010, at A9, available at 2010 WLNR 13974194 (presenting arguments in opposition to the repeal by litigation counsel for the Alliance Defense Fund, a conservative religious liberty organization); Tom Breen, *Retired Chaplains: Preserve ‘Don’t Ask’*, WASH. POST, Oct. 30, 2010, at A2 (detailing efforts by former chaplains to petition President Obama to retain the

advocate on behalf of conservative chaplains as the military prepares for the acceptance of openly gay and lesbian soldiers.¹⁹⁶ So while establishing and maintaining a vision of religious pluralism that is compatible with military discipline is indeed a challenge even more formidable than maintaining religious pluralism in civilian society, it is not one to be ignored or pushed under the rug by anybody with the power to address it — not by the Pentagon, not by Congress, and not by the courts.

policy, noting that clergy will be ineligible to serve in the chaplaincy if their church withdraws support, as some are threatening to do); The Rt. Rev. V. Gene Robinson, Letter to the Editor, *Lifting 'Don't Ask, Don't Tell' Won't Threaten Religious Freedom*, USA TODAY, Aug. 4, 2010, at A8, available at 2010 WLNR 15513660 (responding to the Blomberg editorial as the first openly gay priest elected bishop in the worldwide Anglican Communion). A *Washington Post* article described some of the protests to the repeal of "Don't Ask, Don't Tell":

The Southern Baptist Convention, the Roman Catholic Church, the Orthodox Church in America, the Presbyterian Church in America, and the Rabbinical Alliance of America have issued statements or written to the Obama administration this year with their concerns that repealing "don't ask, don't tell" could force their chaplains to choose between serving God and serving the military.

Breen, *supra* note 195.

196. See Ann Rodgers, *Chaplains in Military Fear Fallout from Repeal of 'Don't Ask, Don't Tell'*, PITT. POST-GAZETTE, Feb. 27, 2011, at A1, available at 2011 WLNR 3851137 (detailing the efforts of organizations such as the North American Mission Board to assure that conservative chaplains are not pressured to change their beliefs in the training process for the repeal of the "Don't Ask, Don't Tell" policy).